IN THE

Supreme Court of the United States

October Term, 1958

No. 471

ANTHONY M. PALERMO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Statement

In order that there may be a sound basis for the proper determination of the instant case by this Court, it is necessary to point out certain factual inaccuracies set forth in the government's brief.

1. The government repeatedly states that Court's Exhibit 2 was examined by the trial court (Gov't Br. 17, 20, 28). Such was not the case (R. 159, Tr. 789-803).*

2. The government states that "there was no testimony" to the effect that "the Steiner, Rouse form [Gov't Ex. 6] was passed back and forth between the petitioner and the Sanfilippo firm" (Gov't Br. 25, fn. 12). Presumably the government is suggesting that, since in its final form Government's Exhibit 6 included entries relating to the year 1952 as well as the year 1951, it must have re-

* As is pointed out in the government's brief (p. 6, fn. 1) the full trial record is before this Court. References to the full trial record are prefixed "Tr."

mained in petitioner's possession until some time in 1953. There was specific testimony establishing directly that Government's Exhibit 6 was delivered to the accounting firm in early 1952 (R. 288-291, 293) and the firm, of course, had it again in 1953 since it was used in preparing the 1952 return (R. 31, 288) and returned it to petitioner. There was moreover an abundance of evidence, wholly uncontradicted, establishing a regular course of dealing between petitioner and the accounting firm, pursuant to which business records, statements, checks, brokerage accounts and other documents were delivered back and forth between petitioner and his accountants. This was established by the testimony of Sanfilippo, Amoruso, James Pollaci (who often acted as petitioner's messenger), and many of the clerical and accounting employees of the Sanfilippo firm and has never been contested by the government.

In other words, delivery of Government's Exhibit 6 to the accounting firm early in 1952, for use in connection with the preparation of petitioner's 1951 return, was in no way inconsistent with the fact that Government's Exhibit 6, in its final form, contained entries relating to the year 1952.

POINT I

18 U. S. C. 3500 is properly before this Court (answering Gov't Br. Point I, particularly p. 17 and fn. 9 on pp. 18-19).

On the basis of an alleged concession, claimed to have been made by defense counsel upon the trial, the Government seeks to invoke an estoppel or waiver. It is thus asserted that the petitioner is prevented in this Court "from being heard" to say that inspection should have been granted under Section 3500.

The government's position is apparently based upon an erroneous conception of what occurred on the trial. *On*

this particular point the printed Transcript of Record is incomplete. Once the full trial record is examined, it clearly appears that there is no merit to the government's contention.

A. In the Trial Court.

(1) Prior to the occasion when petitioner's application to inspect Government's Exhibit 2 was made, both Section 3500 and the decision of this Court in *Jencks* had been discussed, argued and reviewed in other connections, not material here (Tr. 27-29, 50-57, 408-33, 465-86, 545, 577);

(2) Upon the making of the application, both the trial court and counsel for the Government at once construed it as invoking Section 3500 (Tr. 786-789) and discussed the problem in terms of that statute. No disavowal or concession was made by counsel for petitioner.

Thus (Tr. 786):

> "THE COURT: I thought we had gotten away from the Jencks case, and I left my copy of the new statute upstairs.
>
> MR. NEWCOMB: We have one here, your Honor."

And (Tr. 788):

> "MR. MCHUGH: May it please the Court, first of all, let me say that Section 3500 of Title 18, as I understand it, provides that the statement of a witness is to be given to defense counsel only under certain limited circumstances * * * "

And by Mr. McHugh (Tr. 788):

> "It is our position that the memorandum of the conference which was made by Agent Harper * * * is clearly not within the Jencks, so-called, statute, Section 3500."

(3) The trial court, before any alleged "concession" by defense counsel, clearly indicated that it (the trial court) was of the opinion that petitioner was not entitled to relief

under the statute and that, if pressed under the statute, the application would be denied (Tr. 786-789):

Thus, referring to Section 3500 (Tr. 786-787):

"THE COURT: But at the start, as I recall the statute, you are not within 100 miles of it, are you?"

(4) Even after the alleged concession, counsel for the petitioner specifically argued that, if construed to prohibit the inspection sought, Section 3500 was unconstitutional (Tr. 797-797a);

B. In the Court of Appeals.

(5) Petitioner not only raised the point in the Court of Appeals but made it one of the principal grounds of the appeal (Br., Ct. App., 31-35);

(6) In the Court of Appeals the government made no claim of waiver or estoppel, joined issue on the point and fully contested it (Gov't Br., Ct. App., 21-24);

(7) The Court of Appeals not only passed upon the point but devoted the greater portion of its opinion to the point (258 F. 2d 397, at 398-399; R. 427-428).

The Court specifically held (258 F. 2d 397, at 398; R. 427):

"We do not agree with defendant's contention that under the provisions of Section 3500 the memorandum should have been made available to him."

C. In This Court.

(8) In the petition for a writ of certiorari to this Court six out of the nine stated "Question Presented" referred to Section 3500 and in four of them petitioner asserted that he was entitled to inspection under that statute (Pet. Cert. 2-4); and

(9) In opposing petitioner's application for a writ of certiorari the Government did not claim either estoppel or

waiver; on the contrary, the Government joined issue and contested it (Gov't Br. opp. cert. 7-9).

Based upon the whole record, it is submitted that the position of the Government is neither just nor sound. *Friend* v. *Talcott*, 228 U. S. 27 (1913); *Jencks* v. *United States*, 353 U. S. 657 (1957).

Viewed in its proper context and upon the whole record, the alleged "concession" by defense counsel constituted nothing more than a graceful act of deference to a clearly indicated adverse ruling by the trial court. "Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided." *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (2 Cir. 1952), *cert. den.* 343 U. S. 966 (1952).

POINT II

There must be a new trial (Answering Gov't Point II; Gov't Br. 22-29).

Invoking the so-called "harmless error" doctrine, the government contends that even if the trial court erred in denying petitioner's motion to inspect the statements of Sanfilippo as recorded in Court's Exhibit 2 the conviction should nevertheless be affirmed. It is respectfully submitted that the government's position is not well taken.

1. Rationale of Jencks.

Basic in the reasoning upon which the decision in *Jencks* was rendered is the proposition that in a criminal case only the defendant's counsel is in a position to determine the value, importance or significance of the prior statements made by a government witness and the use, if any, to be made of them on defendant's behalf. Thus this Court said (at pp. 668-669):

> "We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

The test is that of relevancy and materiality. If the statement relates, as here, to the subject matter of the witness' trial testimony for the government, justice requires not that the statement be admitted in evidence, not that the defense be permitted to use the statement, but that the defense be permitted to see the statement. The vital right is of the defendant, through his counsel, to inspect the prior statement.

Recognition by this Court that it is the right to inspect that governs, as distinguished from the admissibility or usefulness of the document in question, is made unmistakably plain in *Jencks*. There, this Court quoted from the opinion of Mr. Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. 187, and then stated (at p. 688, fn. 14):

> "What is true before the case is opened is equally true as the case unfolds. The trial judge cannot perceive or determine the relevancy and materiality of the documents to the defense without hearing defense argument, after inspection, as to its bearing upon the case."

This Court then went on to say (at p. 669):

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility * * *"

It is no answer to say that the contents of the statements were merely "cumulative", nor for government

counsel to speculate as to what might or might not have been the outcome, had the fundamental right of the defendant been granted.

Unless defense counsel has had the opportunity both to inspect and be heard, we respectfully suggest that neither this Court, nor the Court of Appeals, nor the District Court, nor government counsel is in a position fairly to determine whether the statements of Sanfilippo as recorded in Court's Exhibit 2 are "cumulative" or not. The doctrine for which the government contends would violate the most fundamental concepts of justice and fair play. It would require petitioner to analyze and expound the refinements, niceties and details of a document he has never been permitted to see.

Fortunately for the petitioner the fact that the statements were not merely cumulative and the further fact that the error was highly prejudicial can readily be demonstrated. But the point is that if the requirements of the statute or of *Jencks*, or both, are met and it is shown that the subject matters of the statement were important, a conviction cannot stand.

It was on this basis that *Jencks* struck down the requirement that there be a preliminary showing of inconsistency. This Court said (353 U. S. at 667):

> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to the defense."

No better illustration of the necessity for inspection could be found than that afforded by the record in the instant case. We have set out in Appendix "A" annexed to this brief successive, limited revelations as to Court's Exhibit 2 made by the government at the various stages of the instant case.

2. The Denial of Petitioner's Motion to inspect was highly prejudicial and constituted reversible error.

The government has admitted that Government Exhibit 6 (the Steiner, Rouse form containing notations in the petitioner's hand of dividends received by him in 1951 and 1952) is one of the matters referred to in Court's Exhibit 2 (Sanfilippo's statements to Special Agent Harper at the August 23, 1956 conference, as recorded by Harper).

We read *Jencks* as not requiring the defense to show prejudice.* But if prejudice is required, it can be shown here.

By the end of the trial five different stories had been placed in the record as to the time and circumstances of the delivery of Government's Exhibit 6 to the Sanfilippo firm. Four of these stories came from Sanfilippo himself. Each depended solely upon his unsupported word; there was no corroborative evidence whatever.

The fifth story (in point of time) came from a disinterested witness, a former employee of the Sanfilippo firm who was called by the government, and that story was substantially supported by circumstantial evidence (R. 288-293, Gov. Ex. 6; Exs. CCC, D, J).

A. *Story Told by a Disinterested Witness*

Mrs. LaCombe stated that when she was working in Sanfilippo's office in early 1952 on the petitioner's 1951 return, she used Government's Exhibit 6, which at that time had entries for dividends received by the petitioner in 1951 (R. 290-291). An examination of Government's Exhibit 6 will reveal certain pencilled notations alongside each entry for 1951, all in Mrs. LaCombe's handwriting. As the face of the exhibit shows, her notations appear for all entries for 1951, and only those entries. She testified, among other

* None of the cases cited by the government are in point or persuasive (see, Gov't Br. 10-11).

things, that she made these notations early in 1952 in connection with preparation of the 1951 return (*Ibid.*). There was no evidence that Mrs. LaCombe ever had any other occasion for working only on the 1951 entries on Government's Exhibit 6.*

B. *The Four Stories Told by Sanfilippo*

(1) On July 19, 1953, Sanfilippo testified under oath to Special Agent Harper (Ex. Y-7, pp. 32-33):

> "I do not know * * * I have no recollection * * * I can not account for" ~~Court's Exhibit 2.~~

(2) On August 23, 1953, Sanfilippo swore (R. 152):

> "*It appears* from examination of the Steiner, Rouse form [Exhibit 6] and photostatic copies of Dr. Palermo's tax returns for 1951 and 1952 that I received this form * * * from Dr. Palermo after Revenue Agent Mishler had commenced his examination of Dr. Palermo's returns * * * *I believe* that Dr. Palermo supplied me with this form * * * at that time." (Italics supplied).

(3) At the trial Sanfilippo stated on direct examination (R. 27):

> "Q. I show you Government's Exhibit 6 for identification and ask you to tell the Court and jury if you have seen that before? A. Yes.
>
> Q. When did you first see it? A. During the course of the tax examination of Mr. Mishler in 1953.
>
> Q. Who gave it to you? A. The defendant."

---

* The government has attempted to disparage this testimony (Gov't Br. 25, fn. 12). It is of note that the statements made by the government in its brief are taken from assertions made by government trial counsel, and are not supported by evidence. A fair reading of Mrs. LaCombe's entire testimony (Tr. 1256-1282) shows that it was positive and clear, and that the efforts by government trial counsel to shake it were unsuccessful.

(4) Sanfilippo's fourth version went even further: he set the purpose, as well as the time, of his receipt of Government's Exhibit 6 by stating (R. 81):

> "In other words * * * all I can say is that it [Government Exhibit 6] was given to us for a certain purpose, and namely the purpose was to get corrected figures concerning his dividends as requested by the revenue agent, Mr. Mishler."

It will readily be seen that each of these four stories was progressively more damning to the petitioner, and the fourth and last was the most incriminating of all.

Sanfilippo's fourth version was false. If that version were true, the earliest time at which Sanfilippo could have received Government's Exhibit 6 was sometime in April, 1953. This was established by uncontroverted evidence that: (a) the request by Revenue Agent Mishler was made at a meeting in Sanfilippo's office, and not on any other occasion (R. 82, 125-127); and (b) that Revenue Agent Mishler's first visit to Sanfilippo's office was on April 17, 1953 (*Ibid.*), a full month after petitioner's 1952 return was filed on March 16, 1953 (R. 7, Tr. 6). Yet the overwhelming evidence, which included Sanfilippo's own admission, established conclusively that Government's Exhibit 6 was used in the preparation of the 1952 return (R. 31, 288; Tr. 1967-2028).

The time when and the circumstances under which Government's Exhibit 6 was first received by the accounting firm constituted the heart of the case. Sanfilippo told four different stories about it, each more damning to the defense than its predecessor. The last was absolutely false. The conference of August 23, 1956 was a crucial stage in the evolution of Sanfilippo's false testimony. Yet petitioner was denied access. If that denial was error, there must be a reversal.

IV.

CONCLUSION

The conviction must be reversed and a new trial ordered.

Respectfully submitted,

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APPENDIX A

Information Supplied by the Government on Court Exhibit 2

A. The Trial Record.

Mr. McHugh stated (Tr. 789):

> "There are no quotes in that memorandum, and, if the Court wishes, I will hand the memorandum to the Court to show you that it is merely a hearsay report of Harper of the conference had with Mr. Sanfilippo on or about August 23rd."

Thereafter he stated (Tr. 800):

> "But here we are faced with something entirely different: a document that is merely the impression or recollection of Agent Harper of what this witness may have said to him at one time or another. * * * "

B. The Government Brief to the Court of Appeals.

In its first point the Government stated (pp. 20-21):

> "This memorandum relates to a conference Special Agent Harper of the Internal Revenue Service had with Mr. Sanfilippo at the time he read and signed his testimony of July 16, 1956 and executed his affidavit of August 23, 1956, copies of which documents were given to defense counsel. It is apparent from the face of this exhibit that the conference took over two hours. The memorandum does not purport to be a transcript or even a complete summary of everything that was said by the witness during that meeting. It is also apparent from the face of the document that it was not prepared by Agent Harper until some hours after the conclusion of the conference (Court Exh. 2, pp. 1, 4)."

It also stated (p. 22):

> "Obviously the memorandum of conference prepared by Agent Harper was not a contemporaneous

report. It was simply his summary of what transpired, intended for the internal use of his office. This document does not purport to be a 'substantially verbatim' account of what Sanfilippo said nor does it quote him in any way."

Under its second point, the Government stated (p. 27):

"It referred to the following matters:

"(1) The kind of records and information submitted by Palermo to Sanfilippo and his firm and the occasion of these submissions.

"This subject was covered by pages 7, 9, 18, 24, 26, 29, 31 and 32 of Exhibit Y-7 and at pages 14-15 of the grand jury testimony (Exh. W-7).

"(2) The subject of Palermo's diary.

"This topic was discussed in both the question and answer statement (Exh. Y-7, page 16) and the grand jury testimony (Exh. W-7, page 5).

"(3) The keeping of records by Sanfilippo pertaining to Palermo's real estate and fees received therefor.

"This was mentioned at page 10 of Exhibit Y-7 and at page 2 of Exhibit W-7.

"(4) The role of Sanfilippo's firm in preparing Palermo's income tax returns.

"This came up on a number of occasions during the questioning of Sanfilippo by the Special Agents (Exh. Y-7, pages 23, 24, 34 and 40), and the witness gave additional testimony about it before the grand jury (Exh. W-7, pages 4, 7 and 21). None of the matter stated in Court Exhibit 2 on these subjects is inconsistent in any material way with either Sanfilippo's grand jury testimony or his statements to the Internal Revenue Service which were furnished to, and used by, defense counsel in cross-examination."

C. The Government Brief in Opposition to the Petition for Certiorari.

The Government said (pp. 6, 7-8, 9):

> "Some hours after the meeting was over, the agents made a memorandum of what took place at this August 23, 1956, meeting (See Court's Ex. 2, pp. 1, 4).
>
> • • •
>
> "It is not disputed that the agent's memorandum (Court Ex. 2) was not signed, approved or otherwise adopted by the witness. As the court below said (Pet. 15), it is quite apparent from the record that the memorandum was made from memory; that it was merely a summary of the agent's recollection, and that it does not appear that the memorandum was a transcript of notes made at the interview. As is apparent from the face of the memorandum, it does not purport to be a transcript or even a complete summary of what was said by the witness during the meeting; and it was not prepared until some hours after the conference. (Court Ex. 2, pp. 1, 4.)
>
> • • •
>
> "The petitioner does not show how failure to provide a defendant with a Government agent's memorandum of the agent's recollection from memory of what had taken place at a meeting with the witness could deprive petitioner of any constitutional right. The memorandum is hearsay as to the witness. There is no recognized rule of evidence under which the petitioner would be entitled as of right to such a document, consisting only of notes or a memorandum made by a third party which the witness has not adopted as his own statement or which the evidence does not show to be in fact his own statement."

D. The Government Brief to the Supreme Court.

The Government said (p. 10):

> "Some time after the conclusion of this meeting with Mr. Sanfilippo on August 23, 1956, the Internal Revenue agents made a memorandum of the meet-

ing, which was placed in the files of the Service (R. 426-427)."

And thereafter (p. 16):

> "Under the statutory procedure, a summary of prior oral statements prepared by the Government agents, and which has not been approved by the witness, is not a 'statement' which must be produced for cross-examination of such witness. As the Court of Appeals held, and as the description of the document itself clearly indicates, Court's Exhibit 2 is such a summary."

In its argument, the Government said (p. 21):

> "The memorandum, consisting of only *fifty-five typewritten lines,* relating to a conference which the heading indicates lasted *three and one-half hours,* is obviously not a substantially verbatim recording. Nor was it approved or adopted in any manner by Government witness Sanfilippo; it was signed only by Agent Harper, sometime after the conference, and later by Agent McGowan. It is merely their summarized version of prior oral statements. Under the legislative standards established in the 'Jencks' Act, it is not fairly attributable to Government witness Sanfilippo, and not subject to compulsory production." (Italics in the original).

And thereafter (p. 24):

> "These other statements were more reliable, being the actual verbatim statements of the witness; they were also equally close in point of time to the events to which they relate; moreover, they had the additional quality of being given under oath, whereas the agent's summary (besides being hearsay as to the witness) was not so made."